89-290

No.

IN THE

Supreme Court of the United States

October Term, 1989

FRANCES JONES, BEVERLY HARDER, ELEANOR MURRAY, LINDA NICKEL, and MARY RUANE

Petitioners,

vs.

TRUCK DRIVERS LOCAL UNION NO. 299

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ellis Boal
(Counsel of Record)
Ronald J. Reosti
925 Ford Building
Detroit, MI 48226
(313) 962-2770

Gary A. Benjamin
Shrauger & Dunn
1666 Penobscot Building
Detroit, MI 48226
(313) 964-2770

Attorneys for Petitioner

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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QUESTIONS PRESENTED*

A. Whether The Decision Below Conflicts With *Lingle V. Norge Div. of Magic Chef, Inc.*, _____ U.S. _____, 108 S.Ct. 1877 (1988), By Preempting A State Claim Which Is Merely Parallel To, But Not Identical To, A Contractual Claim.

B. Whether Preemption Of A State Antidiscrimination Statute Conflicts With The Federal Policy Encouraging Cooperative Federalism For Correction Of Employment Discrimination.

C. Whether A State Claim Can Be Preempted Where The Federal Issue Arises Only In The Defense And Not The Claim Itself.

D. Whether A Seniority System Which (1) Allows Men But Not Women To Temporarily Transfer At Higher Pay, (2) Irrationally Places The Clerical Women In One Unit, (3) Had Its Genesis in Sex Discrimination, And (4) Is Maintained With An Illegal Purpose Is Bona Fide Under The Four-Factor Test Adopted By Other Circuits.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Frances Jones, Beverly Harder, Eleanor Murray, Linda Nickel, and Mary Ruane petition the Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The first decision of the district court is reported as *Jones et al. v. Cassens Transport, et al.*, 538 F. Supp. 929 (E.D. Mich, 1982). The court ordered $365,334.23 in damages against both defendants. The first decision of the court of appeals dismissing appeals is published without opinion at 705 F.2d 454. The second decision of the court of appeals reman-

ding the case to the district court is reported as *Jones et al. v. Truck Drivers Local Union No. 299,* 748 F.2d 1083 (6th Cir. 1984).

The second or 1985 decision of the district court is reported at 617 F. Supp. 869 and is reprinted as Appendix A at pages 1a to 48a of the appendix to this petition (App. 1a-48a). The third decision of the court of appeals is reported at 838 F.2d 856 and is reprinted as Appendix B at App. 49a-89a.

Following the court of appeals' third decision it issued a series of procedural rulings. After timely petitions for rehearing were filed by both parties, on April 29, 1988, the court denied "the petition," seemingly referring only to petitioners' (appellees below), but not respondent's (appellant below) petition. This order is not reported and is reprinted as Appendix C at App. 90a-91a.

Petitioners then moved for a stay pending the outcome of *Lingle v. Norge Division of Magic Chef, Inc.*, _____ U.S. _____, 108 S. Ct. 1877 (1988), in this Court. After *Lingle* was decided, on July 1, 1988, the court of appeals directed the parties to submit briefs on its authority to reconsider its decision and to set out their respective positions in this case in light of *Lingle*. This order is not reported and is reprinted as Appendix D at App. 92a-93a.

On March 21, 1989, the court of appeals denied "appellant's" "petition to rehear the case." The order confused "appellant" with "appellee." This order is not reported and is reprinted as Appendix E at App. 94a-95a.

Respondent filed a motion to clarify the March 21, 1989, order. On April 17, 1989, the court acknowledged "ambiguities" in its order of April 29, 1988, stated it had believed it had already disposed of respondent's petition, and then explicitly denied respondent's petition for rehearing. This order is not reported and is reprinted as Appendix F at App. 96a-97a.

STATEMENT OF JURISDICTION

The court of appeals issued its third opinion on February 3, 1988. The court's final order denying the last petition for rehearing was issued on April 17, 1989. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

On June 6, 1989, the Supreme Court through Justice Scalia extended the time for petitioning for certiorari to August 18, 1989.

STATUTES INVOLVED

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: provided . . .

Section 204 of Michigan's Elliott-Larsen act, 37 M.C.L.A. § 2204 states:

A labor organization shall not:

(a) Exclude or expel from membership, or otherwise discriminate against, a member or applicant for membership because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify membership or applicants for membership, or classify or fail or refuse to refer for employment an individual in a way which would deprive or tend to deprive that individual of an employment opportunity, or which would limit an employment opportunity, or which would adversely affect wages, hours, or employment conditions, or otherwise adversely affect the status of an employee or an applicant for employment, because of religion, race color, national origin, age, sex, height, weight, or marital status.

(c) Cause of attempt to cause an employer to violate this article.

(d) Fail to fairly and adequately represent a member in a grievance process because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Section 211 of Michigan's Elliott-Larsen act, 37 M.C.L.A. § 2211 states:

Notwithstanding any other provision of this article, it shall not be an unlawful employment practice for

an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system.

Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), states:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

Section 706(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(c), states:

> **State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings.** In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Section 708 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-7, states:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law

> of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Section 709(b) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-8(b), states:

> **Cooperation with State and local agencies.** The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class or person in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

Section 1104 of the Civil Rights Act of 1964, 42 U.S.C. 2000h-4, states:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

STATEMENT

A. Proceedings Below

The case arises out of petitioners' loss of jobs due to sex discrimination when their long-time employer, Square Deal, was merged into Cassens Transport on August 26, 1977. The complaint alleged in count I:

> 11. Defendants, jointly and severally, negotiated an agreement to allow employees of Square Deal Cartage Company to bid on jobs at Cassens in accordance with the seniority they had as employees of Square Deal Transport. That said agreement excluded Plaintiffs from such bidding rights.
>
> 12. The sole reason that Defendants excluded Plaintiffs from the benefits of the above described agreement was because they were women.

Complaint §§ 11-12.

The district court' 1985 decision relied on two alternative findings to find discrimination in petitioners' losing their jobs. First, it interpreted the collective bargaining agreement ("CBA"), and found it compelled petitioners' transfer to

Cassens; the district court believed that the fact that all Square Deal employees — drivers, yard, garage, and office — were in a single bargaining unit compelled this holding. Appendix A, App. 8a12a, 33a.

In the alternative, the district court assumed the union's interpretation of the CBA as glossed by uniform past practices were adopted, and that the office workers were in a bargaining unit separate from the other employees. Appendix A, App. 35a-36a. On this assumption, the district court found facts demonstrating both that the system was not bona fide, and that the company and union acted discriminatorily. Appendix A, App. 36a-47a.

The district court also found as fact the respondent union, Square Deal, and Cassens engaged in a pattern of sexually discriminatory conduct throughout the time period. Appendix A, App. 6a-24a.

After the district court's first decision Cassens settled with plaintiffs by paying approximately half of the judgment.

The Sixth Circuit reversed the district court's construction of the CBA that all Square Deal employees had been in a single bargaining unit, and that Square Deal seniority gave them a right to transfer to Cassens. Appendix B, App. 59a-60a. Petitioners do not seek review of that holding.

But the appeals court ignored the myriad of facts found by the district court establishing that the seniority system was not bona fide. Appendix B, App. 60a. As shown below, under the four-factor test utilized by the Fifth circuit and other circuits — and not acknowledged by the opinion — the seniority system was not bona fide.

None of the district court's factual findings as to sexual animus or action by the company and union were reversed.

Finally, the panel, with one judge dissenting, found the second portion of petitioners' claims preempted by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185. (Appendix B, App. 61a) The decision was made without the benefit of this Court's opinion in *Lingle v. Norge Div. of Magic Chef*, _____ U.S. _____, 108 S.Ct. 1877 (1988), decided a few months later. *Lingle* rejected "parallelism" of contractual and statutory issues as a basis for preempting a state statute, and recognized that Section 301 does not preempt state antidiscrimination laws.

Lingle was brought to the Sixth Circuit's attention in post-decision proceedings. The panel at first ordered the parties to brief its "authority" to reconsider. Appendix D, App. 92a-93a. The panel then held it was brought up "too late" and accordingly it had no authority to consider *Lingle*. Appendix E, F, App. 94a-97a. But it also acknowledged "ambiguities" in its rulings leading the parties to believe that a rehearing petition was still pending (and accordingly that consideration of *Lingle* might be proper). Appendix F, App. 96a-97a.

B. Facts

The plaintiffs were office clericals at Square Deal. Their unit consisted of the clerical workers who were women. Appendix A, App. 37a-38a, 41a. Square Deal also employed unionized male clerical "yard inspectors" in the yard, and a unionized male clerical "parts clerk" in the garage. App 38a-39a. All of the male and female clericals worked in Square Deal's "accounting" and "load makeup" functions. *Id.* Occasionally the female clericals did the same work or did similar work alongside of the male clericals. But the men were paid more than the women. When males were occasionally assigned clerical work in the office or the garage they were paid at their prior rates; when plaintiffs got the same assignment, they were paid their

lower office rate. Appendix A, App. 36a-39a. Male drivers would be allowed to work "extra" in the garage rather than be laid off, but women were not when they faced layoff. Appendix A, App. 42a. The women were able to perform all of the yard jobs, whether clerical or not. Appendix A, App. 44a-46a.

In 1958 respondent and Square Deal negotiated that drivers and yardmen (all male) would be on one seniority list. This meant the male yard-clericals could crossbump without loss of seniority. This combined yard/driver list was an exception to the industry practice, Appendix A, App. 8a, 39a., and the district court found as a fact that its purpose was to provide the best available job opportunities, regardless of "units," for the all-male drivers, and their male progeny. App 37a.

In June, 1976, Cassens bought Square Deal. Two months later it filed a request for determination with the Joint Arbitration Committee to establish a seniority board at Cassens arising out of the purchase. By its terms, the request and accompanying exhibits affected all employees including plaintiffs. Appendix A, App. 14a. But the women were never informed of it, did not attend the hearing (though other male Square Deal employees did), and no one spoke for them at the hearing. *Id.* The Committee's ruling in February, 1977, provided for preparation of a new Cassens yard seniority list, including seven Square Deal employees, by dovetailing master seniority lists from among the former employers. Appendix A, App. 15a.

To determine which seven employees would be chosen from Square Deal, the union decided to have a special bid restricted to former yard and driver employees only. Inclusion of office workers in the bid was not precluded by the Committee decision. Appendix A, App. 15a. No notice of this bid was ever

posted. It was held in August-September, 1977. Plaintiffs didn't learn of it until after notice of their terminations and after the merger, during the bidding period. Even though the Committee decision contemplated only seven Square Deal employees in the new Cassens yard, because of an abundance of work, four additional employees were allowed to bid. Appendix A, App. 16a, 20a, 47a.

On occasions both before and at the time the bid started, when a woman asked a union official about transferring to a higher-paying job, she was told she already had the most "pleasurable" job, she was "too emotional" about layoffs, and would be unable to survive a winter in the yard. Appendix A, App. 24a, 43a. The district court found plaintiffs had made innumerable requests over the years to both company and union officials to get out of the office, and were uniformly denied. Appendix A, App. 38a, 42a.

The company's position was expressly stated that no woman had ever worked in the yard and none ever would. Appendix A, App. 17a, 22a. But, when a union official met two of the plaintiffs just after learning they would not be retained, he falsely stated the company's reason was the computerization of its offices. Appendix A, App. 18a.

Plaintiffs' *prima facie* case was fairly summarized by concurring and dissenting Judge Merritt.

> The second group of factual findings concerns other, non-contractual evidence of discrimination. The District Court found that the union engaged in a pattern of discriminatory conduct: repeatedly refusing tonegotiate with Cassens for the plaintiffs' jobs, [617 F. Supp.] at 877-82;making misleading statement to the female members about their rights andthe zeal with which the union was protecting those rights, *id.*, at 878,882; failing to inform or consult the female

> members about the effects of the merger or seniority grievance procedures, *id.* at 877-78; and using segregated seniority lists to prevent women from competing with men for existing or new positions, *id.* at 883.

(Appendix B, App. 69a) He then quoted the district court's factual conclusions. (Appendix B, App. 69a-70a)

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With *Lingle V. Norge Div. of Magic Chef, Inc.*, _____ U.S. ____, 108 S.Ct. 1877 (1988), By Preempting A State Claim Which Is Merely Parallel To, But Not Identical To, A Contractual Claim.

The panel majority summarized its holding[1] by dividing the evidence into two aspects and considering them separately:

> "In summary we construe the district court's order and judgment essentially to have found the defendant union liable for its failure to represent the plaintiffs fairly. [First,] To the extent the district court imposed this liability by reason of the union's agreement, neutral on its face, with respect to seniority recognition and bidding procedures, this ruling is precluded by virtue of Michigan law (§ 37.2211), which respects the legitimacy of seniority. [Second,] Apart from the union's right to rely in good faith on the collective bargaining agreement seniority pro-

[1]The majority's view rests solely on the view that 301 preempts the case because contract construction is involved. (Slip Opinion 14) It does not rest on a view that the independent federal duty of fair representation itself, apart from Section 301, preempts the case. Nor could it. See Slip Opinion 33-40 (Merritt concurring and dissenting).

> visions, plaintiffs' claim against the union for failure to represent fairly under the contract is preempted by federal law, which governs the interpretation of the collective bargaining agreement. The district court's finding of unfair representation based upon sex discrimination also triggers interpretation of the collective bargaining agreement's antidiscrimination clause, again a matter of federal labor law preemption." (Appendix B, App. 61)

The appeals court thus recognized that the second part of the district court's holding was simply that respondent discriminated because of sex apart from the CBA.

Lingle held that a state claim is preempted only if it requires the interpretation of a collective bargaining agreement. Lingle was fired for filing a worker's compensation claim. Illinois tort law protected such filings. The Seventh Circuit had held that because a state court would decide the same issue with the same analysis of the facts as would an arbitrator under the CBA, Lingle's case was preempted. But this Court said such "parallelism" did not make Lingle's case dependent on the contractual analysis.

The majority below, like the Seventh Circuit in *Lingle*, found the mere *existence* of an antidiscrimination clause in the CBA determinative of the preemption issue. (Appendix B, App. 57, 61) The majority also found support for its holding in the prior Sixth Circuit decision in its prior decision in *Maynard v. Revere Copper Products*, 773 F.2d 733 (6th Cir., 1985).

But the right to be free of discrimination effectuated by the company and union *entering into* an ad hoc special bid agreement is a "nonnegotiable state-law right [of] employers or employees independent of any right established by contract." *AllisChalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985). Con-

trast the facts in *Allis-Chalmers* and in *I.B.E.W. v. Hechler*, _____ US _____, 107 S. Ct. 2161 (1987) where the claims arose directly under the CBA.

This does *not* trigger preemption. *Maynard v. Revere Copper Products* is also distinguishable for the same reason, namely, that the source of the rights which petitioners assert is state law independent of the CBA.

The Sixth Circuit in at least two other cases has changed its view or been guided by the teaching of *Lingle*: *Dougherty v. Parsec Inc.*, 872 F.2d 766 (6th Cir., 1989), on remand in light of *Lingle*, _____ U.S. _____, 108 S.Ct. 2813 (1988); *Smolarek v. Chrysler Corp.*, _____ F.2d _____, 131 LRRM 3022 (6th Cir., 1989) (en banc).[2] This case is here timely, and should be afforded the same treatment.[3]

B. Preemption Of A State Antidiscrimination Statute Conflicts With The Federal Policy Encouraging Cooperative Federalism For Correction Of Employment Discrimination.

Michigan, along with all the states, has an abiding interest in prohibiting gender based employment discrimination. *Beech Grove Investment Co. v Civil Rights Commission*, 380 Mich 405, 157 NW2d 312 (1968); *Adama v. Doehler-Jarvis, Div of NL Industries*, 115 Mich. App. 320, 320 N.W.2d 298 (1982);

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[2] "We are aware that *Lingle* has now been decided on June 6, 1988, 56 U.S.L.W. 4512 (U.S. 1988), and that the decision bears upon issues heretofore decided by this court on February 3, 1988." Appendix D, *infra*, at App. ____. Because of the confusion as to what disposition the panel had made with the petitions for rehearing, it did not order reargument after *Lingle*.

[3] *Smolarek*, an *en banc* decision authored by the same judge that wrote the opinion here, found no preemption of a claim that an employer did not provide work consistent with the plaintiff's handicap and then fired him.

Hillman v. Consumers Power Co., 90 Mich. App. 627, 282 NW2d 422 (1979).

After the passage of Title VII, including its clauses encouraging and facilitating state action, 42 USC 2000e-2(h), 2000e-5(c), 2000e-7, 2000e-8(b), and 2000h-4, Congress surely *wants* the states to do everything possible to stop discrimination against women.[4]

A state's antidiscrimination law can actually modify the federal statute. As an example, it is because of the existence of Michigan's Elliott-Larsen act that civil rights claimants in Michigan have 300 days to file a federal discrimination charge against a union, rather than the 180 days which Title VII otherwise provides. *Jones v Airco Carbide Chemical Co.*, 691 F.2d 1200, 1201-04 (6th Cir., 1982); *Mohasco Corp. v Silver*, 447 U.S. 807 (1980).

Even before Congress enacted Title VII in 1964, this Court rejected Railway Labor Act preemption of state antidiscrimination legislation. *Colorado Anti-Discrimination Commission v Continental Air Lines*, 372 U.S. 714 (1963).

It might be argued that the preemption issue posed here arises from federal enactment of 301 and from federal implication of a duty of fair representation from the National Labor Relations Act, and not from Title VII. Accordingly, the argument would run, Congressional expression as to the interplay of state remedies with Title VII are irrelevant.

But the mission of the courts in fashioning the federal common law of labor relations is to accommodate the *totality* of federal labor policy. This policy must be discerned from both the labor laws and the antidiscrimination laws where they in-

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[4] *California Federal Savings and Loan Assoc. v. Guerra* ____ US ____, 107 S Ct 683, 689 (1987) (plurality opinion).

tersect. *Delta Airlines, Inc. v. Kramarsky,* 650 F.2d 1287, 1296-1302, (2nd Cir., 1981), 666 F.2d 21, 26 n. 2, (2nd Cir., 1981), vacated in part on other grounds sub nom *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890 (1983). See also *Lingle, supra,* 108 S.Ct. at 1885 ("Congress has affirmatively endorsed state antidiscrimination remedies in Title VII"); *Shaw v. Delta Airlines,* 463 U.S. 85, 95 n. 13 (1983) (certiorari granted noting importance of question "whether state fair employment laws may be enforced to the extent they prohibit the same practices as Title VII"; held to that extent no preemption); *Burnett v. Grattan,* 468 U.S. 42, 52 n. 14 (1984) ("Congress, for whatever reason, sees no need for national uniformity in all aspects of civil rights cases"; six-month time limitation of *Del Costello v. IBT,* 462 U.S. 151 (1983) rejected).

Thus federal and state courts considering the preemption question as it affects state regulation of discrimination have found no preemption. *Vaughn v. Pacific Northwest Bell Co.*, 289 Or. 73, 611 P.2d 281 (1980) (301); *Franklin Mfg. Co. v. Iowa Civil Rights Commission,* 270 N.W.2d 829 (Iowa, 1978) (NLRA); *Sears v. Ryder Truck Rental,* 596 F. Supp. 1001 (E.D. Mich., 1984) (NLRA); *Bald v. RCA Alascom and Teamsters Local 959,* 569 F.2d 1328 (Alaska, 1977) (NLRA); *Maine H.R.C. v. United Paper Workers,* 383 A.2d 369 (Me, 1978) (NLRA); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir., 1984) (Title VII).

The effect of the panels's opinion on Michigan's ability to enforce the ElliottLarsen Act will be enormous. Any case involving a union with a contract in effect would appear to be preempted. The right to jury trial, *Schafke v. Chrysler Corp.*, 147 Mich. App. 769, 376 N.W.2d 406 (1985), will be jeopardized. Michigan's ability to award compensatory damages, *Slayton v. Michigan Host, Inc.*, 144 Mich. App. 535, 558, 376 N.W.2d 664 (1985), and exemplary damages, *Ledsinger v. Burmeister,* 114 Mich. App. 12, 23, 318 N.W.2d 558 (1982),

and to award these for three years prior to suit, *Slayton v. Michigan Host, Inc., supra,* will be severely compromised. The opinion makes no distinction between Michigan agency proceedings and court proceedings. So a plaintiff who proceeds solely through the Michigan Department of Civil Rights and files her court complaint more than six months after the discriminatory act will evidently be time-barred.

Indeed the Sixth Circuit opinion proves to much. The vast majority of Title VII cases concern some application and interpretation of a CBA, especially those against unions. See e.g. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir., 1973); *Causey v. Ford Motor Co.*, 516 F.2d 416 (5th Cir., 1975). The opinion hardly effectuates Congress' intent that the "policy of outlawing such discrimination should have the highest priority." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). The theme of the Civil Rights Act is cooperative federalism; that of the LMRA is preemptive federalism. The purpose of the LMRA is to consecrate contracts between employers and unions; the purpose of Title VII is to work with states in eradicating discrimination.

C. A State Claim Cannot Be Preempted Where The Federal Issue Arises Only In The Defense And Not The Claim Itself.

Section 301 only entered the district court's alternative holding as an affirmative defense. (Appendix B, App. 80a-81a)

Petitioners did not base count I of their complaint on the antidiscrimination clause, the seniority clauses, or any other clause of the contract. The complaint stated no claim under 301.[5] Rather the claim is based on a violation of Michigan's

[5]The district court did partially based its holding on the contract. But the appeals court reversed that reversal, and petitioners do not contest that reversal.

law against sex discrimination. 37 MCLA § 2204(a)-(d). That law can premise discrimination on *entering into* a discriminatory agreement where none previously existed. *Farmer v. ARA Services,* 660 F.2d 1096 (6th Cir., 1981). The acts of obtaining the Committee decision and entering into the special bid agreement complained of here were neither required nor prohibited by the CBA. "No seniority plan forced the union to ignore, mislead, or segregate the female office workers." (Appendix B, App. 73a (Merritt concurring and dissenting)), a proposition the majority did not dispute.

The panel majority faulted the district court for finding the union liable under the state law without referring to § 37.2211 which recognizes that it is not illegal to act pursuant to a bona fide seniority or merit system. (Appendix B, App. 55) It is true that the district court did this, as shown by the district court's finding of a prima facie case. Appendix A, App. 24a-33a.

But, the reason is that the issue of a bona fide seniority system is an affirmative defense, *Stewart v. General Motors,* 542 F.2d 445 (7th Cir., 1976). Accordingly Judge Taylor addressed the bona fides of the seniority system extensively, but only in reply to that defense. Appendix A, App. 36a-44a.

The majority's view conflicts with *Caterpillar, Inc. v. Williams,* _____ U.S. _____, 107 S. Ct. 2425 (1987). *Caterpillar* confronted the company's argument that 301's preemptive force was so strong as to preempt a state claim even when raised as a defense. The Court rejected this approach, noting that a defendant could then select its forum, and the plaintiff could not control her complaint. 107 S. Ct. at 2433.

After the panel's correct ruling rejecting the district court's first ground, the CBA language only entered the case as part of the union's defense. It was not part of the sex claim itself,

and accordingly under *Caterpillar, Inc.* the sex claim is not preempted.

D. A Seniority System Which (1) Allows Men But Not Women To Temporarily Transfer At Higher Pay, (2) Irrationally Places The Clerical Women In One Unit, (3) Had Its Genesis in Sex Discrimination, And (4) Is Maintained With An Illegal Purpose Is Not Bona Fide Under The Four-Factor Test Adopted By Other Circuits.

Title VII and the Elliott-Larsen Act follow the same standards for liability. (Appendix A, App. 3a). The Fifth Circuit has set out a four-fold test for determining whether a seniority system is bona fide, following this Court's decision in *Teamsters v. U.S.*, 431 U.S. 324 (1977). The factors are:

1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;

2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

3) whether the seniority system had its genesis in racial discrimination; and

4) whether the system was negotiated and has been maintained free from any illegal purpose.

James v. Stockham Valves and Fitting Co., 559 F.2d 310, 352 (5th Cir., 1977), cert. denied, 434 U.S. 1034 (1978). This test has been approved in other cases by other circuits, including the Sixth Circuit. *Sears v. Bennett*, 645 F.2d 1365, 1372 n.

5 (10th Cir., 1981); *Hameed v. International Association of Bridge, Structural and Ornamental Iron Workers*, 637 F.2d 506, 517 (8th Cir., 1980); *E.E.O.C. v. Ball Corp.*, 661 F.2d 531 (6th Cir., 1981).

As shown above, there was no community of interests unique to the women in the office. Clerical employees were scattered throughout the terminal, and no rational purpose was served by keeping the women clericals in one "unit." The system discriminatorily favored men over women in terms of pay when temporary cross-bumping occurred. The practice of allowing clerical men to cross-bump with seniority to driver jobs was an industry aberration. Though the system was created before Title VII or Elliott-Larsen took effect, it was created to favor men. After the laws were passed, the union maintained it and always explained the disparities by reference to petitioners' sex, not to the seniority system. Each of the four factors are implicated in these findings, none of which have been reversed. (Appendix A, App. 36-44a)

Yet the court below simply reversed on the basis of the district court's first ground, and made no findings whatever on the four factors. It did not even acknowledge case law on the point. (Appendix B, App. 59-61) It simply found that the office workers were in a separate bargaining unit, and that therefore their bumping rights extended only within that unit.

But that does not speak to the facts. Under the test acknowledged by all courts, the system is not bona fide. Accordingly, it does not rebut petitioners' prima facie case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ellis Boal
(Counsel of Record)
Ronald J. Reosti
925 Ford Building
Detroit, MI 48226
(313) 962-2770
Gary A.Benjamin
Shrauger & Dunn
1666 Penobscot Building
Detroit, MI 48226
(313) 964-2770

Attorneys for Petitioner